



Welsh Refugee Council

MEDICAL FOUNDATION
for the care of victims of torture



Oxfam

Joint response to the Home Office consultation on exclusion or deportation from the UK on non-conducive grounds

This response is submitted on behalf of the following agencies:

The Refugee Council
Refugee Action
Immigration Advisory Service
Oxfam GB
Scottish Refugee Council
Welsh Refugee Council
Amnesty International UK
The Medical Foundation

August 2005

1. General comments

- 1.1 The agencies submitting this consultation response fully support an ongoing review to ensure that we have the right powers in the UK to prevent terrorist attacks. We welcome the Government's commitment to stimulate debate and consultation on these highly sensitive matters. Widespread consultation will be essential in developing measures that are effective and proportionate to their objectives, whilst upholding and respecting fundamental human rights.
- 1.2 Whilst we welcome the decision to issue this short consultation, we would caution against new measures being rushed through: history teaches us that knee-jerk reactions may lead to poor legislation which does not stand up in the courts. Careful consideration is needed if the security of communities in the UK is to be achieved without generating feelings of insecurity and alienation among some sections of society.
- 1.3 In recent weeks, we have become aware of an enhanced sense of fear and insecurity among some refugee communities and others subject to immigration controls. For some this fear is linked to the general threat of terrorism faced by the UK. For others it stems from the recent rise in racial and religious attacks. And for some it is linked to a fear that they themselves may be unduly and unfairly affected by counter-terrorism measures and returned to unsafe situations in their country of origin.
- 1.4 There is a real need for widespread consultation and public information to ensure that communities' fears are acknowledged and addressed. At a time of great tension it is particularly important that no group feels scapegoated because of the actions of particular individuals. Ongoing engagement with all communities in the UK is also essential in gathering the right intelligence to combat terrorism.
- 1.5 As agencies concerned with the rights and needs of asylum seekers and refugees, we will limit our comments to the possible impact of the proposed measures on refugees and asylum seekers.

2. Response to the consultation document proposal

- 2.1 The consultation covers the proposal to extend the Home Secretary's powers of exclusion and deportation to apply to those who pose an *indirect* threat to:
 - national security
 - public order or the rule of law in the UK
 - or to the UK's good relations with a third country
 - and against those who were involved or the Government suspects were involved in war crime or crimes against humanity, regardless of whether convicted.
- 2.2 Current powers only permit excluding or deporting those who pose a direct threat under the same categories.

- 2.3 The consultation also covers the proposal to add a new list of 'unacceptable behaviours', used to express views, through any means or medium, which the Government considers:
- Foment terrorism or seek to provoke others to terrorist acts
 - Justify or glorify terrorism
 - Foment other serious criminal activity or seek to provoke others to serious criminal acts
 - Foster hatred which may lead to intra community violence in the UK
 - Advocate violence in furtherance of particular beliefs
 - and those who express what the Government considers to be extreme views that are in conflict with the UK's culture of tolerance.
- 2.4 The lack of detail in the consultation document limits our ability to respond in detail. Further, we do not feel that the consultation document demonstrates the need for the new powers to exclude and deport and would welcome more detailed information about why existing powers are deemed to be insufficient. It is our view that those who are a risk to security should be dealt with by the criminal law. We are concerned that as currently drafted, the proposed powers appear extremely broad in scope. Much will depend on the specific way in which the powers are drafted and we would welcome ongoing consultation as the proposals are developed further.
- 2.5 We fully support the Government in their intention to increase public safety. The Anti-Terrorism Act 2001 and the Terrorism Act 2000 already make it illegal for certain terrorist groups to operate in the UK, and have introduced the criminal offence of inciting terrorism. Other existing criminal sanctions against inciting criminal offences and inciting racial hatred are also relevant. We would support the Government in a thorough and consultative analysis of the need for additional sanctions to counter terrorism without breaching the right to a fair trial, and without removing individuals to face the risk of torture or inhuman or degrading treatment.
- 2.6 We are concerned by the Prime Minister's statement that sanctions will be applied to those who foment terrorism anywhere, not just in the United Kingdom. We would like to know how the Government will establish whether an individual has ever had anything to do with terrorism? Would the UK contact the authorities of the country of origin? If so, this could endanger those being investigated, who may later face danger from the authorities in their country of origin, even if they have not had any involvement in terrorism at any stage.
- 2.7 The proposed measures may also adversely affect an individual's asylum claim in the UK. For example, an individual who has fled persecution for association with freedom fighting in their country of origin, may have been considered a terrorist by their Government. They may be hesitant to explain the basis of their asylum claim to a UK Immigration Officer, for fear of being caught within the remit of these proposals.
- 2.8 We are concerned that the proposals, as currently drafted, are extremely vague and as such are open to subjectivity in their interpretation and application. As a result, they could encompass a very broad range of legitimate actions and behaviours. It is essential that the definition of 'unacceptable behaviours' is

drafted strictly and clearly so as to ensure that individuals, including refugees, who express moderate opinions about world affairs or express other forms of legitimate dissent will not be punished with detention, deportation or exclusion. This issue is particularly sensitive and relevant for many refugees who, by definition, have already been forced to flee after expressing political and/or religious beliefs that are deemed unacceptable by the authorities in their countries of origin.

- 2.9 In order to define more clearly the intention of the proposed powers, we strongly urge the Government to include a list of definitions of terms used. How, for example, is 'terrorism' to be distinguished from legitimate freedom fighting? What is the definition of 'serious criminal acts?' We would have grave reservations if the latter term were interpreted as under the Nationality, Immigration and Asylum Act 2002, where 'serious crime' is defined to include shoplifting and graffiti and any other crime receiving a sentence of two years or more.
- 2.10 The 1951 Refugee Convention explicitly excludes serious criminals and terrorists. Article 1 (F) states:
- "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 - (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 - (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.
- 2.11 The Home Secretary has said that the Home Office will look at whether refugees engaging in the proscribed behaviours fall within the grounds for exclusion from protection under the 1951 Refugee Convention. When considering whether an asylum seeker should be excluded on these grounds it is vital that the asylum claim is subject to a full determination procedure and an in-depth assessment before a decision is made on exclusion or deportation. Individuals must have a right of appeal to ensure that unlawful exclusion under the Refugee Convention can be challenged. Determination of such asylum claims can sensibly be prioritised.
- 2.12 However, we are concerned that proposals to detain and fast-track the asylum claims of those who are deemed to have engaged in the newly-defined proscribed behaviours may result in fewer procedural safeguards and give rise to incorrect decisions that have profound consequences for refugees' safety. Further, we are already alarmed by the increasing reliance on detention within the UK asylum system, and we remind the Government that asylum seekers must only be detained in accordance with international law. The Government must ensure that guarantees of procedural fairness in the asylum process are not denied to those suspected but not convicted of serious crimes or 'terrorist'

activity, and that individuals are not incorrectly excluded from refugee status. The starting point must be that refugees themselves are, by definition, escapees from persecution and violence rather than perpetrators of terror.

- 2.13 The Home Office has announced additional plans to maintain a database of individuals around the world who have demonstrated the behaviours outlined in the consultation document. We are concerned that there is no further information about this. How will the Government ensure that individuals aren't placed on the database inappropriately? Would, for example, Nelson Mandela have been placed on the database and remain on it today if it had been in force 30 years ago? Who will have access to the database? And how will individuals be able to challenge inclusion on the database? We believe there is a need to consider and consult on these issues fully before taking the proposal any further.

3. Concerns about *refoulement* and the use of diplomatic assurances

- 3.1 The Government has proposed that, having defined terrorist offences more widely, offending individuals will be deported to their country of origin, even if there is a risk of torture in that country. The Government will seek guarantees from the country of origin that the person being returned will not be subject to torture, inhuman or degrading treatment or punishment.

- 3.2 The fundamental legal safeguard for those fearing torture is Article 3 of the European Convention on Human rights (ECHR) which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This right is absolute and applies to all forms of removal to another country.

- 3.3 The central importance of Article 3, and the reasons why there are no possibilities for a state to derogate from it, are reflected in *D v United Kingdom* (1997) 24 ECHR 423:

"in exercising their right to expel... Contracting States must have regard to Article 3 of the Convention..., which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3... prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question..."

- 3.4 The 1998 Human Rights Act incorporates the ECHR into UK law. We strongly oppose any suggestion that the Government could or should amend the Human Rights Act or the ECHR itself in order to circumvent its obligations under Article 3 ECHR. The prohibition against return to prohibited ill-treatment, known as the 'non-refoulement' principle, is in any case contained in other international conventions including the Convention Against Torture and the International Covenant on Civil and Political Rights (ICCPR) and is now considered to be part

of customary international law.¹ The UK cannot lawfully contravene the principle of non-refoulement and it is not in its interests to do so.

- 3.5 The European Court of Human Rights has examined states' use of 'diplomatic assurances' to enable deportations and circumvent a country's obligations under Article 3. In *Chahal v United Kingdom* (142) the Court considered the case of a Sikh activist who was to be returned to India by the UK. It ruled that, despite diplomatic assurances from the Indian Government, the UK would be in violation of its obligations under Article 3 if it were to return him, as the Indian government would not be able to ensure that members of the security forces would not breach Chahal's human rights.
- 3.6 While we commend the Government's resolution to promote respect for human rights overseas, diplomatic assurances cannot guarantee that human rights abuses will not take place. The UK has an obligation to look into each individual's case and assess in depth the likelihood of risk of persecution on return.
- 3.7 Reliance on diplomatic assurances, including the agreement concluded with Jordan in July 2005, gives rise to a number of additional concerns:
- Attempts by the UK to erode Article 3 of the ECHR would set a worrying precedent, which may lead to the erosion of the entire international human rights framework.
 - The very fact that the Government sees a need for such assurances against torture demonstrates that there is a real risk of torture or ill-treatment in the receiving country.
 - There are many examples of states that practise torture but claim not to because it is contrary to international law.
 - The countries that the Prime Minister has indicated he would like to conclude such agreements with include those from which refugees continue to flee persecution.
 - There is no guarantee that a state from which an assurance is obtained will comply with it.
 - Even if the State complies with the assurance, they may not be able to protect the individual against the actions of unofficial rogue state agents.
 - It is almost impossible to monitor adherence to the assurance, given that much torture and ill-treatment is covert.
- 3.8 Other European countries relying on diplomatic assurances have deported individuals who have subsequently been ill-treated by the very governments that promised not to do so. Sweden, for example, has been roundly condemned for expelling a terror suspect to Egypt in violation of international law. The United Nations Committee Against Torture rebuked Sweden for relying on diplomatic assurances and noted that Sweden was well aware of Egypt's long track record of torture.² We do not believe the UK Government would wish to follow this precedent.

¹ Further, the prohibition of torture has been recognised as having attained the status of *jus cogens*, meaning that it is a norm of customary international law that is recognised by the international community of States as a whole as a norm from which no derogation is permitted.

² The full text of the UN Committee Against Torture's decision is available at <http://www.unhcr.ch/tbs/doc.nsf/0/4dec90a558d30573c1257020005225b9?Opendocument>

3.9 There are very real risks that individuals will be subject to torture or cruel, inhuman or degrading treatment or punishment if returned to a country with which the UK has a diplomatic assurance. We urge the Government to take note of the advice of the UN special rapporteur on torture, the UN Independent Expert on the Protection of Human Rights and counter-terrorism and the Council of Europe Commissioner for Human Rights, who have all cautioned that the use of such assurances threatens the global ban on torture and other ill-treatment. The threat of terrorism, though a highly complex and sensitive area, cannot justify limiting or suspending human rights. Such an approach may indeed be counter-productive and further alienate sections of society whose co-operation is essential for an effective counter-terrorism policy. All communities have been the victims of terror. We urge the Government to make consistent efforts to gain the trust and support of communities, including refugee communities, if the success of counter-terrorism measures is to be realised.

4. Comments about wider counter-terrorism proposals

- 4.1 The Prime Minister has promised wide consultation on the other elements of his 12-point counter-terrorism plan. We look forward to commenting further on these proposals. Of particular concern to us are plans for non-suspensive appeals against decisions to deport, plans for an automatic refusal of asylum and additional measures to secure the UK's borders. These measures are profoundly important in the context of the future of the international refugee protection system.
- 4.2 We welcome the Prime Minister's statement that the Government will debate and engage with all parts of our communities and we look forward to ongoing, long-term dialogue in this regard.

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